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ABSTRACT

The Fair Labor Standards Act contains provisions and standards concerning minimum wages, equal pay, maximum hours and overtime pay, recordkeeping, and child labor. These basic requirements apply to employees engaged in interstate commerce or in the production of goods for interstate commerce and also to employees in certain enterprises that are so engaged. However, the law provides some specific exemptions from these requirements as to employees employed by certain establishments and in certain occupations. This publication provides general information concerning the application of the Fair Labor Standards Act to employees of private and public colleges and universities and other institutions of higher education. (Author/HS)

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INSTITUTIONS OF HIGHER EDUCATION

Under The Fair Labor Standards Act

February 1972

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UNITED STATES DEPARTMENT OF LABOR
Employment Standards Administration
Wage and Hour Division

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U. S. DEPARTMENT OF LABOR
Employment Standards Administration
Wage and Hour Division
Washington, D. C. 20210

INSTITUTIONS OF HIGHER EDUCATION UNDER THE FAIR LABOR STANDARDS ACT

GENERAL STATEMENT

The Fair Labor Standards Act contains provisions and standards concerning minimum wages, equal pay, maximum hours and overtime pay, recordkeeping, and child labor. These basic requirements apply to employees engaged in interstate commerce or in the production of goods for interstate commerce and also to employees in certain enterprises which are so engaged. However, the law provides some specific exemptions from these requirements as to employees employed by certain establishments and in certain occupations. The Act is administered by the U. S. Department of Labor's Wage and Hour Division.

This publication provides general information concerning the application of the Fair Labor Standards Act to employees of private and public colleges and universities and other institutions of higher education. If you have specific questions about the statutory requirements, contact the WH Division's nearest office.

COVERAGE

The ordinary meaning of the phrase "institutions of higher education" is that they are institutions above the secondary level, such as colleges or universities, junior colleges, professional schools of engineering, law, library science, social work, etc. The term is not defined in the Fair Labor Standards Act, but generally an institution of higher education is an educational institution which admits as regular students only individuals having a certificate of graduation from a high school or the recognized equivalent of such a certificate and is legally authorized within a State to provide a program of education beyond high school.

The educational program of an institution of higher education normally awards a bachelor's degree, or provides not less than a two-year program which is acceptable for full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge.

The Fair Labor Standards Act applies to all activities performed in connection with the operation of institutions of higher education

(whether public or private or whether operated for profit or not for profit) regardless of the annual dollar volume of the institution, provided there are in the enterprise employees engaged in interstate commerce or in the production of goods for interstate commerce, including employees who handle, sell, or otherwise work on goods which have been moved in or produced for such commerce.

The Act makes a State or a political subdivision of a State responsible as an employer for compliance with the Act in regard to all of its employees employed in activities in connection with the operation of such a school in carrying out its mission of providing education. This would be true even though they may be part of a central or servicing staff or otherwise employed at a location away from the physical premises where the classes are conducted, so long as they are employed in the statutory enterprise.

Where a separate agency or central body is charged with the mission of operating a school, generally its employees would similarly be subject to the Act's provisions regardless of where they work, so long as their work is in furtherance of such mission. For example, where a State agency, such as a board of regents is charged with functions in connection with the operation of State institutions of higher education, employees of the agency who work in connection with such functions would be subject to the Act's provisions, unless specifically exempt.

It should be noted that there will be situations in both publicly and privately operated educational institutions where it will be necessary to consider all the facts carefully in order to determine whether the activities of an employee are actually performed in connection with the operation of an institution of higher education or whether his activities are too remotely related to the institutional operations to come within the covered enterprise.

For example, although it has been concluded as a general rule that the operation of fraternity and sorority houses are not part of a college or university enterprise, there may be instances where the facts demonstrate that the fraternities and sororities are part of such enterprise. Whether the university, for example, exercises a high degree of supervision and control over the sorority or fraternity, or whether the sorority or fraternity house is owned by the university, may well be important indicia of whether the operation of the house should be considered part of the university or college enterprise.

It will also require a thorough analysis of all the facts in a particular situation to determine whether the activities of a college or university athletic association are part of the school enterprise.

On the other hand, it is generally accepted that persons working under the auspices of a college or university at experimental or research stations located away from the campus would not be considered as being covered under the Act, provided no instruction is given and no students are present at

the stations. Such experimental activities are not considered a part, continuation, or extension of the academic program of the school.

THE EMPLOYMENT RELATIONSHIP

The Act defines the term "employ" in section 3(g) as including "to suffer or permit to work". However, in interpreting the Act, the Supreme Court has made it clear that the Act was not intended "to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantages on the premises of another."

Volunteer Services: With the above judicial guidance the WH Division has been able, in administering the Act, to apply its provisions in a manner which would not frustrate the bona fide efforts of individuals to volunteer and donate their services for activities of a humanitarian, public service, or religious nature to which they desire to make a contribution. Therefore, individuals who may volunteer their services, usually on a part-time basis, to an institution of higher education, not as employees or in contemplation of pay for the services rendered , are not considered employees within the meaning of the Act.

Religious, Charitable or Nonprofit Organizations: There is no special provision in the Act which precludes an employee-employer relationship between a religious, charitable, or nonprofit organization and persons who perform work for such an organization. For example, a church or religious organization may operate an institution of higher education and employ a regular staff who do this work as a means of livelihood. In such cases there is an employee-employer relationship for purposes of the Act.

Members of Religious Orders: Persons such as nuns, monks, priests, lay brothers, ministers, deacons, and other members of religious orders who serve pursuant to their religious obligations in schools and other institutions operated by the church or religious order are not considered to be "employees" within the meaning of the law.

Graduate Assistants: Where a graduate student is engaged in original professional-level research which is primarily for the purpose of fulfilling the requirements for an advanced degree, even though he may be performing such research under a grant or stipend, the WH Division will not assert that an employer-employee relationship exists. Where no such relationship exists there is, of course, no application of the minimum wage and overtime pay provisions of the Fair Labor Standards Act.

On the other hand, a teaching assistant or associate who is assigned a class or laboratory section, or who has as his primary duty a teaching activity such as demonstrating laboratory experiments, would be considered an employee.

Extracurricular Activities: As part of their overall education programs, schools may permit or require students to participate in activities in connection with dramatics, school publications, glee clubs, bands, choirs, orchestras, debating teams, intramural and intercollegiate athletics and other similar endeavors. Participation by the student in such programs, conducted primarily for the benefit of the participants as part of the educational opportunities provided to the students by the school, does not create an employment relationship between the school and the student. The payment of a nominal sum by the school to a student for participating in such activities would not, of itself, change this conclusion.

However, we would generally consider an employment relationship to exist with respect to students whose duties are not part of an overall educational program and who receive some compensation. Thus, students such as those who are hired to work at food service counters, to sell programs, or to usher at athletic events are covered employees and subject to the Act's monetary requirements. In addition, participation by students in counseling programs and new student orientation programs appear to be activities of a type to which an employer-employee relationship may apply, although any determination would have to be made on the basis of all the facts in the particular situation.

BASIC MONETARY REQUIREMENTS

Minimum Wages: Covered nonexempt employees of an enterprise engaged in the operation of an institution of higher education must receive not less than $1.60 per hour. For employees of institutions of higher education in Puerto Rico and American Samoa, industry wage orders may set minimum rates below $1.60 per hour.

Facilities Furnished to School Employees: Where meals, lodging, or other facilities are customarily provided for the benefit of the workers, the reasonable cost or fair value is considered as wages paid, under section 3(m) of the Act. This section also provides that such costs shall not be included as part of wages to the extent that they are excluded therefrom by the terms of a bona fide collective bargaining agreement. The reasonable cost is defined in the Regulations, Part 531, as the actual cost to the employer without a profit.

Educational costs defrayed for the student may be considered as "other facilities". The educational cost defrayed for a student employee is that portion of the regular tuition or fees that is absorbed by the school through such means as reduction in the regular tuition or a grant which is credited to the account of the student. This would be considered wages under section 3(m) of the Act, as would any reduction in charges for board and lodging.

The cost of facilities furnished by the employer primarily for the employer's benefit instead of the worker's may not be included in computing wages. For example, the cost of furnishing and laundering uniforms, where required by the employer or by the nature of the job, may not be charged to the employee where such charge would reduce the wages paid in any workweek below the required minimum wage. For purposes of computing overtime, the employee's regular rate is the stipulated wage before the deduction was made.

EQUAL PAY PROVISIONS

Under the equal pay provisions, the employer may not discriminate on the basis of sex by paying employees of one sex at rates lower than he pays employees of the opposite sex, in the same establishment, for doing equal work on jobs requiring equal skill, effort and responsibility which are performed under similar working conditions. The equal pay provisions apply to all nonexempt employees working in an establishment in which the employer has some employees subject to the minimum wage provisions of the Act.

The Act provides an exception from the prohibition against payment of wages at lower rates to one sex than the other for equal work where it can be shown that the wage differential is based on a seniority system, a merit system, a system measuring earnings by quantity or quality of production, or on any other factor other than sex.

An employer who is paying a wage differential in violation of the equal pay provisions of the Act may not reduce the wage rate of any employee in order to comply with these provisions. Wages withheld in violation of the equal pay provisions have the status of unpaid minimum wages or unpaid overtime compensation under the Act, and back wages due under the equal pay provisions are subject to the same methods of recovery as any other wages due under the Act.

The law prohibits any labor organization, or its agents, representing employees of a covered employer, from causing or attempting to cause the employer to discriminate against an employee in violation of the equal pay provisions.

Special certificates: Unless specifically exempt, all covered employees must be paid at least the applicable minimum wage, regardless of whether the employees are paid on a time, job, incentive, or any other basis. However, learners, apprentices, messengers, handicapped workers, student-workers, and full-time students employed in retail or service establishments may be paid a special minimum wage lower than the statutory minimum provided that special certificates are first obtained from the WH Division's Administrator.

OVERTIME PAY

The Fair Labor Standards Act requires the payment of not less than one and one-half times the regular rate of pay to covered, nonexempt employees after

40 hours of work in a workweek. The Fair Labor Standards Act does not require that an employee be paid each week. The employer may make his wage or salary payment at other regular intervals, such as every two weeks, every half month, or once a month. What the Act does require is that both minimum wage and overtime pay must be computed on the basis of hours worked each workweek standing alone.

As a result, except for a special overtime provision for hospital employees, the hours of work of an employee may not be averaged over 2 or more weeks. Thus, an employer may not credit an employee with compensatory time (even at one and one-half hours for each overtime hour worked) for overtime earned, which is to be taken at some mutually agreed upon later date, but must pay for such overtime in cash.

Workweek: A workweek is a regular recurring period of 168 hours in the form of seven consecutive 24-hour periods. The workweek need not be the same as the calendar week. It may begin on any day of the week and at any hour of the day. Once established, however, an employee's workweek may not be changed unless the change is intended to be permanent.

Regular Rate: Before overtime pay can be computed it is necessary to determine the employee's regular rate, since the Act requires payment for overtime hours at not less than one and one-half times the regular rate of pay. The regular rate may be more than the statutory minimum but it cannot be less. The regular rate includes all remuneration for employment, such as attendance bonuses, production bonuses, shift differentials, and other extra payments for work actually performed.

Payments which are not part of the regular rate include reimbursement for expenses incurred on the employer's behalf; premium payments for overtime work; the premium portion of time and one-half paid for work on Saturdays, Sundays, and holidays; discretionary bonuses; gifts and payments in the nature of gifts on special occasions; payments pursuant to certain profit-sharing, welfare, or thrift and saving plans; and payments for occasional periods when no work is performed due to vacation, holiday, or illness.

Certain employment provided by educational institutions does not normally constitute 12 months of work each year. For the convenience of the employee, the salary earned in the duty months may be prorated into equal monthly installments throughout the entire year provided the employee's regular rate for overtime pay purposes is computed on the salary earned in the duty months and not on the prorated installments. For example, a school may employ a nonexempt employee for 10 months out of the year and, by agreement, pay that employee his salary over a 12-month period. This is permissible providing the employee's regular rate for overtime pay purposes is computed on the 10-month basis.

The regular rate for an employee paid solely on an hourly rate is the employee's hourly rate. For an employee who is paid a salary for a

specified number of hours a week, the regular rate is obtained by dividing the weekly salary by the specified hours. If a salary is paid as straight-time pay for whatever number hours are worked in a workweek, the regular rate is obtained by dividing the salary by the total hours worked each week. If a salary is paid on other than a weekly basis, the weekly pay must ordinarily be determined in order to compute the regular rate and overtime pay. For instance, if the salary is paid for a half month, multiply the salary by 24 and divide the product by 52 to get the weekly equivalent. A monthly salary should be multiplied by 12 and the product divided by 52, except in the case of an employee who works less than a full year and whose salary is prorated as discussed above. If the hourly rate obtained is less than the applicable minimum wage, the employer must make up the difference.

Note: The Fair Labor Standards Act does not require premium pay for Saturday, Sunday, or holiday work as such, or vacation or severance pay, or a discharge notice; nor does it set any limit on the number of hours of work for males or females 16 years of age and over.

HOURS WORKED

General Statement: An employee subject to the Act in any workweek must be paid in accordance with its provisions for all hours worked in that workweek. In general, "hours worked" includes all the time an employee is required to be on duty or on the employer's premises or at a prescribed workplace, and all the time during which he is suffered or permitted to work for the employer.

For example, all the time spent by school custodians in the operation and maintenance of school buildings and the protection of school property both during and after school hours is generally considered hours worked under the Act.

All hours worked by an employee in more than one job classification for the same employer within the same workweek must be combined for purposes of determining whether overtime pay is due. For example, the hours worked by an employee as a custodian must be added to the hours worked by him as a bus driver. The employee must then be properly compensated by the school for the total number of hours worked.

Duty of 24 Hours or More: Where an employee subject to the Act has 24 hour shifts of duty or longer, as may sometimes be the case in a university hospital, the employer and the employees may agree that bona fide sleeping periods and meal periods will not be counted as hours worked. No off duty time need be counted as hours of work if the employee has complete freedom from duties and may leave the premises for his own purposes.

If sleeping time is interrupted by a call to duty, the time of the interruption must be counted as time worked. If the employee does not

get at least five hours of sleep during the scheduled sleeping period, the entire time is working time. No more than eight hours of sleeping time can be discounted as hours worked in any 24 hour period.

Bona fide meal periods during which the employee is completely relieved from duty for the purpose of eating regular meals are not worktime.

Ordinarily 30 minutes or more is long enough for a bona fide meal period. Coffee breaks or time for snacks are counted as part of an employee's working time. If meal periods are frequently interrupted by calls to duty the employee would not be considered relieved of all duties and the period must be counted as hours worked.

Employees Residing on Employer's Premises: An employee who resides on his employer's premises on a permanent basis or for extended periods of time (such as a house mother or dormitory counselor) is not considered as working all the time while on the premises. Ordinarily, the employee may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when the employee may leave the premises for personal purposes. It is of course difficult to determine the exact hours worked under these circumstances and any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted.

On Call Time: An employee who is not required to remain on the employer's premises and is free to engage in his own pursuits, subject only to the understanding that he leave word at his home or with the school where he may be reached, is not working while on call for the purposes of the Fair Labor Standards Act. When an employee does go out on call in such a situation, only the time actually spent on making the call need be counted as hours worked. Of course, if calls are so frequent or the "on-call" conditions so restrictive that the employee is not really free to use the intervening periods for his own benefit, waiting time may be counted as hours worked.

A more detailed discussion of all of the preceding principles of "hours worked" is contained in the WH Division's Publication No. 1344 on Hours Worked.

EXEMPTIONS

Executive, Administrative, and Professional Exemption: The Act provides a minimum wage and overtime pay exemption for any employee employed in a bona fide executive, administrative, or professional capacity (including academic administrative personnel and teachers) as these terms are defined in the WH Division's Regulations, Part 541. An employee will qualify for exemption if he meets all the pertinent tests relating to duties, responsibilities, and salary as stipulated in the regulations.

Among the basic requirements for exemption are the following: An executive employee's primary duty must be the management of the educational institu-

tion, or of a recognized department or subdivision; an administrative employee must primarily perform office or nonmanual work of substantial importance to the management of the school, while an academic administrative employee must perform work directly related to the academic instruction or training carried on therein; and a professional employee must primarily perform work requiring advanced knowledge in a field of science or learning, or be employed and engaged as a teacher in the educational establishment by which he is employed.

Individuals engaged in the overall academic administration of an institution of higher education include the president and those of his assistants whose duties primarily concern such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and graduate standards, and other aspects of the teaching program. Academic deans and department heads such as the heads of the mathematics department or the English department are other employees engaged in academic administration.

Examples of jobs in educational establishments and institutions which are outside the term "academic administration" are jobs relating to building management and maintenance, jobs relating to the health of the students and academic staff such as social worker, psychologist, cafeteria manager or dietician. Such an employee would not qualify as "academic administrative" personnel but may otherwise qualify for exemption as an executive, administrative, or professional employee, provided both the duty and salary tests of the particular exemption are met.

A requisite for exemption as a teacher is the condition that the employee is "employed and engaged" in this activity as a teacher certified or recognized as such in the school establishment or institution by which he is employed. Teaching consists of the activities of teaching, tutoring, instructing, lecturing and the like in the activity of imparting knowledge.

Those faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisers in such areas as drama, forensics, or journalism are engaged in teaching. Such activities are a recognized part of the institution's responsibility in contributing to the educational development of the student. As discussed in Regulations, Part 541, an employee who is employed and engaged as a teacher is excepted from the salary or fee requirement for exemption as a professional employee.

CHILD LABOR PROVISIONS

The Fair Labor Standards Act provides a 16-year minimum age in occupations other than those nonagricultural occupations declared hazardous by the Secretary of Labor. An 18-year minimum age applies in such hazardous occupations.

Minors 14 and 15 years of age may be employed outside school hours in a variety of nonmanufacturing and nonhazardous occupations for limited hours

of work and under other specified working conditions. Child Labor Bulletin No. 101 provides detailed information on the child labor standards.

Whenever State and Federal child labor standards apply to the same employment, the higher standards prevail.

RECORDS

Employers are required to keep records on wages, hours, and other items listed in the recordkeeping regulations, (Regulations, Part 516). Most of this required information is the kind employers usually keep in ordinary business practices and in complying with other laws and regulations. No particular form of records is required.

Records required for exempt employees differ from those for nonexempt workers.

Special information is required on employees under uncommon pay arrangements or to whom board, lodging, or other facilities are furnished. Records of the required information must be preserved for 3 years. Some supplementary items like timecards need be kept only 2 years. Microfilm copies of records are generally acceptable.

Some of the specific recordkeeping items required by Regulations, Part 516, are the following:

(1) Name of employees in full.
(2) Home address, including zip code.
(3) Date of birth, if under 19.
(4) Sex and occupation.
(5) Time of day and day of week on which the employee's workweek begins.
(6) Regular hourly rate of pay in any workweek in which overtime premium is due; basis of wage payment (such as "$2 hr.", "$16 day", "$80 wk.", "$80 wk. plus 5% commission").
(7) Daily and weekly hours of work.
(8) Total daily or weekly straight time earnings.
(9) Total overtime compensation for the workweek.
(10) Total additions to or deductions from wages paid each pay period.
(11) Total wages paid each pay period.
(12) Date of payment and the pay period covered by payment.

POSTER

The covered educational institution must display a Notice to Employees where the employees may readily see it. This poster, which briefly outlines the Act's basic requirements, may be obtained free from the nearest office of the WH Division.

ENFORCEMENT: Authorized representatives of the WH Division may investigate and gather data regarding wages, hours, and other conditions and practices of employment. The Act provides these methods of recovering

unpaid minimum and/or overtime wages: (1) the Administrator may supervise the payment of back wages; (2) in certain circumstances the Secretary of Labor may bring suit for back pay upon the written request of an employee; (3) an employee may sue for back wages and an additional sum as liquidated damages plus attorney's fees and court costs; and (4) the Secretary of Labor may also obtain a court injunction restraining violations of the law, including the unlawful withholding of proper minimum wage and overtime pay.

It is a violation of the law to discharge or otherwise discriminate against an employee for filing a complaint or participating in a proceeding under the law.

Willful violations may be prosecuted criminally and the violator fined up to $10,000 on each count. A second conviction for such a violation may result in imprisonment.

A 2-year statute of limitations applies to the recovery of back wages except in the case of willful violations, in which case a 3-year statute of limitations would be applicable.

THE AGE DISCRIMINATION IN EMPLOYMENT ACT

This Act (which is also enforced by the WH Division) promotes the employment of the older worker based on ability rather than age; prohibits arbitrary age discrimination in employment; and helps employers and employees find ways to meet problems arising from the impact of age on employment. It prohibits arbitrary discrimination in employment, based on age, by employers of 25 or more persons in an industry affecting interstate commerce, employment agencies serving at least one such employer, and labor organizations with 25 or more members in an industry affecting interstate commerce. However, this law does not apply to employment with the Federal, State or local governments.

Most individuals who are at least 40 but less than 65 years of age are protected from age discrimination in matters of hiring, discharge, compensation, or other terms, conditions, or privileges of employment.

THE FEDERAL WAGE GARNISHMENT LAW

The Federal Wage Garnishment Law (Title III of the Consumer Credit Protection Act), also enforced by the WH Division sets restrictions on the amount of an employee's earnings that may be deducted in any one week through garnishment proceedings and on discharge from employment by reason of garnishment. When an employee's disposable earnings--the part remaining after deductions required by law are made--are more than $64 a week, up to 25% of the disposable earnings may be garnished. Where the disposable earnings are $64 or less, only the amount over $48 may be garnished. This law does not change most garnishment procedures established by State law,

nor does it annul or affect any provision of a State law that provides greater restrictions on garnishments than under Federal law.

LIST OF PUBLICATIONS

Fair Labor Standards Act
General Coverage, 29 CFR Part 776
Recordkeeping Regulations, 29 CFR Part 516
Employment of Full-time Students at Special Minimum Rates, Regulations, 29 CFR Part 519
Wage Payments under the Fair Labor Standards Act, 29 CFR Part 531
Defining the Terms Executive, Administrative, Professional Employee and Outside Salesman, Regulations, 29 CFR Part 541
Overtime Compensation, WH Publication No. 1325
Hours Worked, WH Publication No. 1344
Equal Pay for Equal Work, 29 CFR Part 800
Child Labor Bulletin 101, WH Publication 1330
Child Labor Bulletin 102, WH Publication 1295
Age Discrimination in Employment, 29 CFR Part 850 and Part 860
The Federal Wage Garnishment Law, WH Publication No. 1324

This publication is for general information and is not to be considered in the same light as official statements of position contained in Interpretative Bulletins and other such releases formally adopted and published in the Federal Register.

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